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FILED
MAY 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1377

In the
Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA,

Petitioner,

v.

ALLEN HARMAN,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL J. BEARD II
Counsel of Record
SHARON L. BROWNE
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Respondent

QUESTION PRESENTED

In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), this Court endorsed a flexible approach to 42 U.S.C. § 1988 attorneys' fees that takes into account all the unique facts of a civil rights litigation to determine the reasonableness of fees. Should *City of Riverside* be overruled and a new rule adopted that, when a prevailing civil rights litigant recovers damages, attorneys' fees awarded under 42 U.S.C. § 1988 must be capped so that the fees are proportional to the damages recovery?

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Respondent Allen Harman hereby opposes the Petition for Writ of Certiorari of Petitioner City and County of San Francisco, et al. (City).

INTRODUCTION

Nearly four years ago—and after five years of contentious litigation—Harman won a jury verdict holding the City liable for an official policy of race discrimination that caused a delay in his promotion. Harman was awarded significant damages for economic and emotional distress, and secured a groundbreaking published appellate court decision on municipal liability under 42 U.S.C. § 1983. *Harman v. City & County of San Francisco*, 136 Cal. App. 4th 1279 (2006) (*Harman I*).

For his excellent results, Harman obtained reasonable attorneys' fees under 42 U.S.C. § 1988 (Section 1988). The trial court ***twice*** awarded the fee, which was affirmed most recently by the court of appeal in *Harman v. City & County of San Francisco*, 158 Cal. App. 4th 407 (2007) (*Harman II*). The City now petitions this Court for review of those fees. Yet beyond mere disagreement with the fee amount, the City fails to explain how this case presents a ground for this Court's review under United States Supreme Court Rule 10.

The only plausible basis for review—that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"—is inapplicable here. Neither the trial court's award, nor the court of appeal's opinion affirming it, decided ***any*** unsettled federal question. To the contrary, Harman's fee award was based on the faithful application of existing and uniform federal law

on Section 1988 attorneys' fees, including a venerable line of this Court's precedents. Moreover, review of this particular fee award is especially unworthy, given its basis in the unique—and at times disputed—facts of the case.

At bottom, the City wants this Court to jettison the existing precedents on which the lower courts relied and create a "rule of proportionality," whereby attorneys' fees are capped in relation to a prevailing civil rights litigant's damages award. In *City of Riverside v. Rivera*, this Court endorsed a flexible approach to Section 1988 fee calculations that takes into account all the unique facts of a civil rights litigation to determine the reasonableness of fees. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Importantly, it considered and rejected precisely the kind of strict proportionality rule the City advances in its petition: "We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Id.* (plurality); *id.* at 585 (Powell, J., concurring) ("Neither the decisions of this Court nor the legislative history of § 1988 support such a 'rule.' The facts and circumstances of litigation are infinitely variable."); *see also id.* at 595 (Rehnquist, C.J., dissenting) ("I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute.").

City of Riverside has stood the test of time. The Court's Section 1988 jurisprudence has provided lower courts with the guidance and flexibility necessary in such an inherently fact-intensive inquiry as determining a proper fee award. It also advanced the

legislative purpose behind Section 1988: To encourage the litigation of meritorious civil rights cases—like this one—without providing "windfalls" to civil rights attorneys. A reversal of *City of Riverside* and the creation of a "rule of proportionality" would all but ensure that most meritorious civil rights claims never see the inside of a courtroom.

Having tenaciously fought Harman's race-discrimination claim to the very end, the City cannot now complain about the very same fees that its own litigation strategy caused to be incurred. Certainly, the City should not expect to find relief in this Court, where no grounds for review exist. The City's petition should be denied.

STATEMENT OF THE CASE

A detailed statement of the unique facts of this litigation is necessary to understand the basis for the trial court's fee award and the court of appeal's opinion affirming it. The statement will highlight what the City downplays or completely ignores: the City's aggressive defense against Harman's claim over the course of ***five years***, and Harman's excellent results nonetheless—i.e., a jury verdict finding that the City had a policy or custom of reverse race discrimination, significant damages, and a published appellate decision protecting government employees against racially discriminatory practices.

A. Harman and Two Co-Workers File a Complaint in Federal Court

This case began nearly nine years ago with three plaintiffs, including Respondent Allen Harman, who

were employed as airfield safety officers at the San Francisco International Airport (Airport), a department of the City. *Harman II*, 158 Cal. App. 4th at 411. In 1999, they initiated this lawsuit against the City, the Airport Commissioners, and the Airport Director in federal court, after they were passed over for promotion to a supervisory position pursuant to a policy that favored racial minorities and women over white men. *Id.* The federal complaint brought two claims: one claim for violation of the Equal Protection Clause of the Fourteenth Amendment and a second claim for violation of Article I, Section 31, of the California Constitution, which bans race- and sex-based discrimination (Proposition 209). *Id.* at 419. The Equal Protection claim sought both damages and equitable relief; the Proposition 209 claim sought equitable relief only. *Id.*

On December 1, 1999, the federal district court dismissed Plaintiffs' Proposition 209 claim without prejudice and abstained from adjudicating the federal Equal Protection claim pending resolution of the Proposition 209 claim in state court. *Cheresnik v. City & County of San Francisco*, 2 Fed. Appx. 878, 880-81 (9th Cir. 2001). Plaintiffs appealed the decision to the Ninth Circuit Court of Appeals. *Id.* On January 26, 2001, the Ninth Circuit issued a conclusive ruling in favor of Plaintiffs, vacating the abstention order and remanding to the district court for reconsideration of whether abstention was appropriate. *Id.* at 882.

B. Plaintiffs File a Complaint in State Court

While the appeal was proceeding in the Ninth Circuit, and in order to protect their rights, Plaintiffs filed their Proposition 209 lawsuit in state court on

December 15, 1999, seeking declaratory and injunctive relief. *Harman II*, 158 Cal. App. 4th at 412. Thereafter, negotiations between the parties culminated in an agreement to proceed solely in state court. The parties' agreement was endorsed by the federal district court on May 21, 2001, and Plaintiffs voluntarily dismissed their federal suit. *Id.* at 411-12. No proceedings on the merits took place in federal court.

On April 19, 2001, Plaintiffs filed a first amended complaint in state court, alleging both their Equal Protection claim and their Proposition 209 claim. *Id.* at 412. Both claims supported equitable relief and damages. *Id.* In the time between the original complaint and the first amended complaint, the parties engaged in a substantial amount of discovery, including written discovery and numerous depositions of witnesses who later testified at trial.

The City demurred to and filed a motion to strike Plaintiffs' amended complaint, challenging Plaintiffs' demand for damages under Proposition 209. *Cheresnik v. City & County of San Francisco*, No. A098415, 2003 WL 1919111, at *1 (Cal. Ct. App. Apr. 23, 2003). The trial court sustained the demurrer in an order dated June 25, 2001, and Plaintiffs' Proposition 209 claim was dismissed. *Id.* Following the completion of discovery, the City filed a motion for summary judgment, which was granted on January 9, 2002. *Id.* The trial court dismissed Plaintiffs' complaint on March 20, 2002, and Plaintiffs filed an appeal. *Id.*

The court of appeal reversed the dismissal of Harman's Equal Protection claim for damages, while affirming the dismissal of the other two plaintiffs.

Cheresnik, 2003 WL 1919111, at *19-*20. Harman's claim was allowed to proceed to trial.

C. The Parties Perform Extensive Discovery, Participate in a Mandatory Settlement Conference, and Prepare for Trial

Upon returning to the trial court, the parties resumed discovery, participated in a mandatory settlement conference, and prepared for trial. Most importantly, all of this work was performed exclusively on behalf of Harman and in prosecution of his Equal Protection claim for damages.

The parties had a mandatory settlement conference on June 2, 2004, pursuant to California Rule of Court 3.1380. California Rule of Court 3.1380(c)(3) requires that at least five court days prior to the date set for a mandatory settlement conference, each party is to submit a mandatory settlement conference statement that includes "a good faith offer of settlement." The City's statement contained no offer of settlement. Indeed, at no time before or after the mandatory settlement conference did the City make a *statutory offer of settlement*, which—if rejected by Harman—would have substantially limited the amount of attorneys' fees Harman could have recovered. Cal. Code of Civ. Proc. § 998.

The City has long contended that, at the mandatory settlement conference, it made an oral offer of settlement in the amount of $25,000. *See, e.g.*, Petition at 6 n.1. As the trial court recognized, Petitioner's Appendix at 49, the record is devoid of any competent evidence of this alleged oral offer, which (even if made) would have been confidential like the

rest of the mandatory settlement conference proceedings and therefore an improper factor in assessing a fee claim. Cal. Evid. Code §§ 1119, 1126. The court of appeal upheld the trial court's refusal to consider the alleged oral offer of settlement. To this day, the issue of the City's alleged oral offer of settlement remains hotly disputed by the parties and represents a principal ground for the City's disagreement with the fee award. Petition at 6 n.1.

Harman's counsel prepared extensively for trial. Among other things, they reviewed reams of documents produced throughout the litigation; assembled 136 trial exhibits, consisting of hundreds of pages; prepared voir dire questions for the jury; prepared jury instructions; prepared for the direct and cross-examination of nineteen witnesses at trial, including three expert witnesses; submitted a lengthy trial brief; and filed and argued several motions in limine.

D. Harman Prevails at Trial

On June 21, and 22, 2004, the trial court heard numerous pre-trial motions and swore in the jury. On June 23, 2004, Harman's counsel began questioning witnesses. The two-week trial concluded on July 2, 2004. After just three hours of deliberation, the jury issued the following special verdict findings:

- The City had an official policy or custom to intentionally discriminate against white males in promotional opportunities at the San Francisco International Airport;

- The City intentionally denied Harman a promotion because of his race;

- The City's official policy or custom was the moving force behind the intentional denial of Harman's promotion because of his race;

- The City would not have denied him the promotion if race had not been a factor; and

- This intentional denial of a promotion based on race caused Harman $15,300 in economic damages and emotional distress that should be compensated by an additional $15,000.

Harman II, 158 Cal. App. 4th at 413.

The trial court entered judgment on the verdict on July 15, 2004. On July 19, 2004, the City moved for judgment notwithstanding the verdict (JNOV) and for new trial. After oral argument, the trial court issued an order dated September 10, 2004, in which it denied the City's motions. *Id.*

E. The Trial Court Grants Harman Reasonable Attorneys' Fees

On August 30, 2004, Harman presented the trial court with motions[1] for attorneys' fees under Section 1988. Harman requested $1,095,202 in fees, representing almost five years of hard-fought litigation in this civil rights case. On December 29, 2004, after a hearing, the trial court issued its order granting Harman's motions for attorneys' fees in their entirety,

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[1] Since this case's inception, Harman's lead counsel have been Pacific Legal Foundation (PLF) attorneys. Andrea Miller, of the Sacramento firm Nageley, Meredith & Miller (NMM), was retained as trial counsel, assisting with discovery, trial preparation, the trial itself, and post-trial proceedings and appeals. Pacific Legal Foundation attorneys and NMM filed separate motions for attorneys' fees.

"after due consideration of the success obtained relative to the relief sought and other circumstances of this case." *Harman II*, 158 Cal. App. 4th at 413.

F. The Court of Appeal Upholds Harman's Jury Verdict and Remands the Attorneys' Fees Award

The City appealed Harman's jury verdict and damages award, along with his attorneys' fees award. The court of appeal affirmed the verdict and damages award. *Harman I*, 136 Cal. App. 4th at 1317. It held that an official discriminatory policy, as promulgated and implemented by a high-ranking official in the City's Human Resources Department, was the moving force behind the decision to intentionally discriminate against and deny Harman a promotion because he was white. *Id.* at 1299-1304. The court published its opinion, which represents a significant precedent in the area of municipal liability for constitutional violations under 42 U.S.C. § 1983.

With respect to fees, the court of appeal rejected the City's extraordinary demand that it set aside the trial court's order and award a maximum fee of $90,900—i.e., three times the amount of damages obtained by Harman. Instead, the court of appeal vacated the attorneys' fees order and remanded the issue to the trial court. *Harman I*, 136 Cal. App. 4th at 1316-17. Relying upon established and uniform precedents, the court described in detail the legal framework for determining a reasonable attorneys' fee under Section 1988. *Id.* at 1306-17.

The court of appeal first instructed the trial court to "recalculate the lodestar figures applying the proper standards of reasonableness." *Id.* at 1316. This initial

calculation involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 1307 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Second, the court of appeal instructed the trial court to "adjust the fee to reflect the plaintiff's limited success by pursuing the two-step analysis dictated by [*Hensley v. Eckerhart*, 461 U.S. 424 (1983)]." *Harman I*, 136 Cal. App. 4th at 1316. The court explained the *Hensley* two-step analysis as follows:

> First, it should exclude hours expended on claims that are unrelated to the claim of damages on which Harman succeeded at trial. Secondly, it must reduce the award to reflect the limited nature of Harman's relief in comparison with the scope of the litigation as a whole. As instructed by *Hensley*, the court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success."

Id. at 1316-17 (citing *Hensley*, 461 U.S. at 436-37). The court of appeal "express[ed] no opinion as to the amount of fees that the [trial] court should award," leaving that question to the trial court's "sound discretion." *Harman I*, 136 Cal. App. 4th at 1317.

G. On Remand, the Trial Court Grants Harman a Reasonable Attorneys' Fee Award

On remand, Harman filed a renewed request for attorneys' fees in the total amount of $1,118,457.75, which included additional fees for work performed in the last appeal through remand. *Harman II*, 158 Cal.

App. 4th at 414. On September 8, 2006, the trial court entered an order awarding $1,113,905.40. *Id.* at 415.

The trial court supported its award with a clear and well-reasoned decision. Faithfully applying the court of appeal's instructions, the trial court calculated an initial lodestar based on reasonable hours multiplied by reasonable attorney rates. Then, it applied the two-step analysis set forth in *Hensley*, 461 U.S. 424, to account for Harman's limited success—i.e., the facts that two of his co-plaintiffs were dismissed, that his state claim was dismissed, and that he did not obtain equitable relief. *Harman II*, 158 Cal. App. 4th at 421-25.

After substantial reductions were realized in the first step of the *Hensley* analysis, Harman's fee award represented *only* work performed on his successful Equal Protection claim for damages. While recognizing the disproportionality of fees as compared to the damages award, the trial court considered numerous other factors weighing against further reductions, including the public benefit of the litigation. *Harman II*, 158 Cal. App. 4th at 425-27. The trial court cited the strong statement Harman's verdict sent to the City, the vindication of a constitutional right, and the resulting published opinion of the court of appeal that provides strong protections to government employees against municipal wrongdoing, *Harman II*, 158 Cal. App. 4th at 426—all factors that the court of appeal authorized, *Harman I*, 136 Cal. App. 4th at 1315-16. The trial court also found that Harman obtained the equitable relief he desired—the promotion and a change in hiring policy—both in the midst of the litigation and because of it. *Harman II*, 158 Cal. App. 4th at 426.

In light of these factors, the trial court concluded that a further reduction in fees would ignore the court of appeal's admonition against "double counting"—a practice constituting an abuse of discretion. *Harman I*, 136 Cal. App. 4th at 1312 (citing *Cunningham v. County of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988) ("[A]ny reliance on factors that have been held to be subsumed in the lodestar determination will be considered an abuse of the trial court's discretion.")).

The City filed a second appeal from the fee award.

H. The Court of Appeal Upholds the Trial Court's Fee Award

1. The Court of Appeal Reaffirms the Legal Principles Stated in Its First Opinion

In the second appeal of Harman's fee award (*Harman II*), the court of appeal relied on the same settled legal principles it set out in its prior decision (*Harman I*). First, it reaffirmed the applicable standard of review, which required that "broad discretion . . . be accorded to the trial court" in its determination of a reasonable attorneys' fee. *Harman II*, 158 Cal. App. 4th at 415. The court explained:

> [O]ur review of the award is severely constrained. We review the trial court's award of attorney fees under section 1988 for an abuse of discretion. The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason . . . . We defer to the trial court's discretion because of its superior understanding of the litigation and the desirability of avoiding frequent

> appellate review of what essentially are factual matters.

Id. at 418 (internal citations and quotation marks omitted).

Second, the court of appeal reaffirmed—almost verbatim—the established legal framework for determining a reasonable fee award that it described in *Harman I*. *Id.* at 416-18, 419-21, 425-26. As the court put it, in *Harman I*, it "articulated at some length the essential guidelines that govern attorney fee awards to partially prevailing plaintiffs under section 1988, and we reiterate them as pertinent here." *Id.* at 416. The court described how the lodestar is calculated by multiplying reasonably expended hours by reasonable hourly rates. Then, relying strictly on established federal and state precedents, the court described when and how adjustments to the lodestar are made under *Hensley*'s two-part analysis to account for limited success. *Harman II*, 158 Cal. App. 4th at 416-18.

2. The Court of Appeal Concludes That the Trial Court Did Not Abuse Its Discretion in Awarding Harman's Fees

Having reaffirmed these uncontroversial legal principles, the court proceeded to consider carefully each of the City's objections to the trial court's fee award.

The City's principal complaint was that the award should be slashed to $90,900 to make it proportional—by a three-to-one ratio—to Harman's damages recovery of $30,300. *Id.* at 419. The City made the same argument in *Harman I*. Citing several

state and federal cases, including the plurality opinion in the landmark decision of this Court in *City of Riverside*, 477 U.S. at 574, the court of appeal again rejected the City's strict rule of proportionality in civil rights cases:

> The law does not mandate . . . that attorney fees bear a percentage relationship to the ultimate recovery of damages in a civil rights case. Instead, the court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved.

Harman II, 158 Cal. App. 4th at 419 (citing, *inter alia*, *City of Riverside*, 477 U.S. at 574; *Hensley*, 461 U.S. at 436; and *LeMaire v. Maass*, 12 F.3d 1444, 1461 (9th Cir. 1993)).

The court of appeal underscored the dangers of any rule of proportionality. It observed that such a rule "would seriously undermine Congress' purpose in enacting [section 1988]"—i.e., to "provide many victims of civil rights violations with effective access to the judicial process" and to "encourage lawyers to accept civil rights cases." *Id.* at 420 (citing *City of Riverside*, 477 U.S. at 576-78, and *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 164 (2006)). Thus, the court of appeal declined to adopt the City's "mathematical proposal to cap the fee," noting that "[t]he Supreme Court has disapproved on more than one occasion of such pretensions to mathematical precision." *Harman II*, 158 Cal. App. 4th at 421 (internal citations and quotation marks omitted).

The court of appeal next examined the adjustments made to the lodestar by the trial court in order to account for Harman's limited success, "with primary emphasis 'on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.'" *Id.* (quoting *Hensley*, 461 U.S. at 435). As an initial matter, the court of appeal commended the trial court for "follow[ing] our directive taken from *Hensley* to 'provide a concise but clear explanation of its reasons for the fee award.'" *Harman II*, 158 Cal. App. 4th at 422 (citing *Harman I*, 136 Cal. App. 4th at 1308). With respect to the trial court's adjustments, the court of appeal applied existing federal and California precedents, and found no abuse of discretion. *Harman II*, 158 Cal. App. 4th at 422-27.

The vast majority of the trial court's adjustments were based on Harman's concessions in his fee request on remand. Harman excluded from his lodestar *all* hours on the unsuccessful Proposition 209 claim in state court, *all* hours expressly spent in pursuit of equitable relief in state court, *all* hours spent in pursuit of equitable relief in federal court, and *all* hours spent on work performed exclusively on behalf of his two co-plaintiffs who did not prevail. *Id.* at 422-25. There were some state-court hours spent in pursuit of *both* equitable and damages relief that Harman believed it could not isolate and eliminate, but the trial court elected to excise those hours as well. *Id.* at 424. Nevertheless, the trial court did conclude that some hours were spent on inextricably related successful and unsuccessful claims, and could not be separated out. With the exception of those hours spent defending the fee award in *Harman I* (which resulted in vacation of

the award and remand), the court of appeal concluded the trial court did not abuse its discretion in preserving the remaining hours. *Id.* at 424-25.

The court of appeal then considered whether the trial court abused its discretion in not making further reductions to the fee award in step two of the *Hensley* analysis to account for Harman's lack of overall success. *Id.* at 425. The court of appeal noted, again, that the trial court "followed the directions recited in [*Harman I*]" and "specifically expressed awareness that the award was 'far greater than the amount of monetary damages awarded.'" *Id.* (quoting trial court). The court of appeal determined that the trial court's multiple justifications against further reducing the fee award were reasonable: (1) significant reductions were already made, and further reductions constituted improper double-counting; (2) the fee award was "not out of proportion to the overall success and significance of the litigation, and is commensurate to Plaintiff's long, hard-fought struggle for vindication of his constitutional right"; (3) Harman's "primary purpose" —which he achieved through his lawsuit—was "to obtain his promotion and prevent the City from continuing to implement the challenged discriminatory employment practices"; (4) Harman obtained a jury verdict finding that the City had a policy or custom of reverse race discrimination; (5) Harman's lawsuit produced a published decision protecting government employees against discriminatory practices; and (6) "the jury awarded 78% of the highest amount of actual damages requested." *Id.* at 425-26 (quoting trial court).

The court of appeal did not rubber-stamp the trial court's fee award. To the contrary, it was systematic,

deliberate, and conscientious in its review of the award. In fact, the court of appeal was clear that it did not agree with every aspect of the trial court's ultimate conclusions. *Id.* at 427. But it was equally clear that, under the abuse-of-discretion standard, the trial court's reasoning was faultless:

> The abuse-of-discretion standard requires us to uphold a ruling which a reasonable judge might have made, even though we would not have ruled the same and a contrary ruling would also be sustainable. We cannot substitute our own judgment. The only proper basis of reversal . . . is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination. We do not find that the award at issue here reaches the level of an abuse of discretion. The trial court handled this case for several years, and upon remand engaged in a rigorous and thorough procedure to review the attorney billings. We are not in a position to second guess the court's factual findings, nor are we persuaded that the attorney fees were awarded arbitrarily with no reason or justification.

Id. at 428 (internal citations and quotation marks omitted).

The court of appeal remanded to the trial court "for the limited purpose of deleting from the total award those amounts that relate solely to billing for work done on the attorney fee issue in [*Harman I*]" and "affirmed" the award in all other respects. *Id.* Finally, the court declared that the parties were to bear their

own costs and fees on appeal, partly "in an effort to bring this protracted litigation to a close." *Id.* at 429. The California Supreme Court denied the City's petition for review.

REASONS FOR DENYING THE PETITION

I

THERE IS NO CONFLICT—LET ALONE CONFUSION—AMONG THE LOWER COURTS IN AWARDING SECTION 1988 FEES

The result of the court of appeal's decision affirming the trial court's fee award undoubtedly is unsettling to the City. But dissatisfaction with a particular court decision is not the relevant criterion for this Court's review, which in this case is: Did the court of appeal "decide[] an important question of federal law that has not been, but should be, settled by this Court"? U.S. Sup. Ct. R. 10. The answer is "no."

The court of appeal applied existing and uniform precedents to reach the unremarkable conclusions that (1) fee awards are reviewed for abuse of discretion, and (2) given the particular facts of this case and Section 1988 case law, the trial court's fee award did not constitute an abuse of discretion. *Harman II*, 158 Cal. App. 4th at 418, 427-28 (citing over one dozen cases for the principle that trial judges have broad discretion to decide fees); *id.* at 416-21, 425-27 (citing numerous cases for legal framework governing Section 1988 fee awards, including *Blanchard v. Bergeron*, 489 U.S. 87 (1989); *City of Riverside*,

477 U.S. 561; *Hensley*, 461 U.S. 424; *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975)). The court did not decide a federal question that this Court has not yet settled; the court merely *applied* this Court's *already settled* precedents in determining a reasonable fee amount under Section 1988.

The City claims that Harman's fee award "resulted from the confusion among circuit courts over whether a fee award that is grossly disproportionate to the value of the relief sought or recovered for the client . . . should be considered presumptively unreasonable." Petition at 11. The City cites numerous decisions reflecting different fee awards made in different cases—differences that the City labels as "contradictory." *Id.* at 14-16. The alleged "confusion" and "contradictions" have no basis in reality; instead, the different awards are the entirely predictable result of the fact that settled legal principles are applied to vastly different factual situations.

The City cites one line of cases that "have appropriately presumed that a fee award is unreasonable if it is grossly disproportionate to damages." *Id.* at 14. It then cites an allegedly "contradictory line of cases" that "have readily countenanced attorneys' fees that dwarf the recovery obtained for the client." *Id.* at 15. But a careful reading of the cases cited by the City reveals that not one of them repudiates any of this Court's Section 1988 precedents.

In each of the City's favored cases, the court reversed or reduced the fee award, not pursuant to some rule of proportionality, but because the case's unique facts, in their totality, rendered the award

unreasonable. *Cole v. Wodziak*, 169 F.3d 486, 488 (7th Cir. 1999) (failure to show a "public interest" benefit in a "run of the [mill] case that did not contribute to the development of legal principles and would have little deterrent effect"); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998) (failure to take into account limited success and failure to establish a public benefit); *Gumbhir v. Curators of the Univ. of Missouri*, 157 F.3d 1141 (8th Cir. 1998) (limited success not accounted for, where prevailing plaintiff lost on all but one claim and where litigation resulted in no public benefit); *Corder v. Brown*, 25 F.3d 833, 836 (9th Cir. 1994) (limited success not accounted for, where plaintiffs rejected a relevant settlement offer that exceeded their damages award, obtained "only one-seventeen-millionth" of the damages they sought, and only three of 45 named defendants were found liable); *McGinnis v. Kentucky Fried Chicken of Cal.*, 51 F.3d 805 (9th Cir. 1994) (no finding of a public benefit).

In each of the City's disfavored cases, the court upheld a fee award, again because of the unique facts of the case and despite the award's lack of proportionality to the prevailing plaintiff's damages. Petition at 15-16. But this is consistent with this Court's decision rejecting an arbitrary cap of fees, or any kind of presumption of "unreasonableness" based solely upon proportionality. *City of Riverside*, 477 U.S. at 574 (plurality) ("We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers."); *id.* at 585 (Powell, J., concurring) (same).

In sum, the most that can be said of the "two lines of cases" cited by the City is that the courts arrived at different results, based on the unique facts of the cases. Where the City finds "confusion" and "contradictions," this Court will find reasoned flexibility—and, consequently, a diversity of results—in the determination of Section 1988 fees. This Court can expect no more, and no less, in such a fact-intensive inquiry.

II

REASONABLE FEE AWARDS IN SUCCESSFUL CIVIL RIGHTS CASES REWARD DILIGENT, PUBLIC-INTEREST ATTORNEYS

Section 1988 is first and foremost about encouraging and rewarding meritorious civil rights lawsuits. This is because "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley*, 461 U.S. at 444 n.4. Thus, Congress enacted Section 1988 "specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside*, 477 U.S. at 576.

As this Court recognized, "[a] rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." *Id.* Indeed, the Court has gone so far as to say that "[a] rule of proportionality would make it difficult, ***if not impossible***, for individuals with meritorious civil rights claims but relatively small potential damages to

obtain redress from the courts." *Id.* at 578 (emphasis added). But the absence of a proportionality rule does not mean that civil rights attorneys will obtain "windfall" fees.

Civil rights plaintiffs must overcome a heavy burden of proof and of persuasion before prevailing and, as the City well knows, government defendants have multiple procedural mechanisms for defeating claims—e.g., demurrers, motions for judgment on the pleadings and summary judgment, and appeals. A civil rights case remains very risky, particularly for contingent-fee or pro bono counsel, like Harman's counsel in this case.

Besides the procedural mechanisms for screening out civil rights claims, government defendants have another weapon against fee awards: statutory offers of settlement. For example, in California, a plaintiff's rejection of a defendant's settlement offer before trial prevents plaintiff's recovery of fees incurred thereafter if he prevails, significantly reducing a losing defendant's fee liability. Cal. Code of Civ. Proc. § 998 ("If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer."); *Greene v. Dillingham Constr. N.A., Inc.*, 101 Cal. App. 4th 418, 426 (2002) (affirming that "defendant has the option of making a formal settlement offer . . . if he seeks to avoid liability for fees"). Thus, it behooves civil rights plaintiffs and their counsel to consider such offers or risk forgoing fees. Of course, the City tenaciously fought Harman's discrimination claim without *ever* availing itself of the statutory offer to settle. If Harman's fee award creates

an incentive, it is to encourage the City to take seriously the civil rights claims of all plaintiffs, regardless of race.

Finally, the City overlooks the unique facts of this case, which justified Harman's fee award. The trial court made the award based in large part on the existence of factors that most section 1983 cases will not present: (1) Harman endured a "long, hard-fought struggle for vindication of his constitutional right"—i.e., a five-year struggle against one of the largest, most powerful, and best-financed local government entities in the country; (2) his lawsuit achieved the goal of "prevent[ing] the City from continuing to implement the challenged discriminatory employment practices"; and (3) his lawsuit produced *Harman I*—a precedent-setting "published opinion establishing that employers may not shield themselves against liability for illegal discriminatory conduct by its employee when it has, in fact, a policy or practice of delegating final decision making authority in the realm of the conduct at issue to that employee." *Harman II*, 158 Cal. App. 4th at 426 (quoting trial court). The public benefit conferred by Harman's efforts in this lawsuit is uniquely significant and will seldom be repeated by other civil rights litigants.

The City conveys a sense of urgency about government's vulnerability to the threat of over-litigation and drastic fee awards that is grossly exaggerated, and characterizes government entities and officials as the victims of aggressive civil rights enforcement actions. Petition at 20-22. But, as explained above, Section 1988 was enacted to *encourage* prosecution of civil rights claims and to *discourage* government misdeeds—not the other way

around. Moreover, government entities have plenty of procedural devices to protect themselves against excessive fee awards. That the City now regrets its unyielding defense of this case, and the resulting fee award, is not grounds for review.

III

THIS CASE IS NOT THE PROPER VEHICLE FOR OVERHAULING THIS COURT'S SECTION 1988 JURISPRUDENCE

Not only does the Petition present no grounds for review; it also is a poor vehicle for this Court's reconsideration of its Section 1988 jurisprudence. Harman's fee award comes before the Court on a disputed record. The nature, scope, and effect of the City's proposed rule of proportionality cannot adequately be defined without fully and clearly developed facts.

For example, the City continues to contest the fact that this case caused it to undergo an institutional shift in behavior. Petition at 9 n.3. In the first appeal of this case the court of appeal in dicta seemed to agree with the City. *Cheresnik*, 2003 WL 1919111, at *12. But the trial court later made its own independent finding that the case had in fact caused the City to change its behavior, which the court of appeal subsequently affirmed. *Harman II*, 158 Cal. App. 4th at 426. The City's continued dispute of this fact pertains directly to the reasonableness of Harman's fees.

Moreover, the City continues to insist that it made an oral offer of settlement before trial that was close to Harman's damages award. Petition at 6 n.1. The City

believes this alleged fact contributes to the unreasonableness of the fee award. *Id.* at 6; Petitioner's Appendix at 103. Harman has always disputed the City's allegation, pointing to the fact that there is no evidence in the record that such an oral offer of settlement was ever made, let alone in the amount claimed by the City. The trial court agreed with Harman. Petitioner's Appendix at 49. The City's continued assertion of this fact also pertains directly to the reasonableness of Harman's fee.

These and other disputed facts too numerous to discuss here cloud the record in this case. The Court should be hesitant to accept a petition regarding such an important and far-reaching question as the complete overhaul of its Section 1988 jurisprudence in a case without clean and undisputed facts.

CONCLUSION

For all these reasons, the City's petition should be denied.

DATED: May, 2008.

Respectfully submitted,

PAUL J. BEARD II
Counsel of Record
SHARON L. BROWNE
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Respondent